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UNIPHONE TELECOMMUNICATIONS BHD

v.

BRIDGECON ENGINEERING SDN BHD & ANOR

B

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
HISHAMUDIN MOHD YUNUS JCA
SYED AHMAD HELMY JCA
[CIVIL APPEAL NO: W-03(IM)-24-2010]

C

25 FEBRUARY 2011

CIVIL PROCEDURE: *Summary judgment - Appeal against - Breach of contract - Defendant withholding payment payable under deed of assignment - Whether defendant entitled to withhold payment - No triable*

D

issues raised - Plaintiff's claim plain and obvious - Rules of the High Court 1980, O. 14

CONTRACT: *Breach - Default in payment - Deed of assignment executed by defendant undertaking to pay certain monies to plaintiff - Payment linked to works done under a turnkey contract - Monies to be*

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paid by defendant within 18 months of issuance of certificate of practical completion - Defendant refusing to pay monies due alleging defects in works done - Whether monies payable by defendant amounted to a retention sum - Whether defendant in breach in refusing to pay

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Gaya Kombinasi (M) Sdn Bhd ("Gaya"), the employer, had awarded to the respondents ("plaintiffs") a Turnkey Contract for the construction of an office building known as Mines Waterfront Business Park at a consideration of RM70,500,000. Subsequently, Gaya entered into a sale and purchase agreement ("SPA") with

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the appellant ("defendant") wherein Gaya agreed to sell to the defendant the land together with the office building under construction then. The plaintiffs were not parties to the SPA, while the defendant was not a party to the Turnkey Contract. To facilitate payments of the balance sum of RM19,386,709 due by

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Gaya to the plaintiffs under the Turnkey Contract, a deed of assignment ("the DOA") was entered into between Gaya, the plaintiffs and the defendant. The DOA provided as follows: (i) that instead of paying Gaya RM15,000,000 as part payment under the SPA, the defendant would pay this sum directly to the plaintiffs;

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(ii) that the remaining sum of RM4,386,7090 due to the plaintiffs from Gaya under the Turnkey Contract shall be paid by Gaya

directly to the plaintiffs; and (iii) that in consideration of the RM15,000,000 being paid by the defendant for and on behalf Gaya to the plaintiffs, Gaya will have no claim against the defendant in respect of the RM15,000,000 and that this sum shall be considered as having been fully discharged under the SPA. When the plaintiffs achieved Practical Completion, the Architect duly issued the CPC on that date. The respondents claimed that they were entitled to be paid unconditionally within 18 months from the date of the issuance of the CPC. The appellant however refused to pay the respondents the sum of RM8 million as claimed by the latter on the grounds of the respondents' failure to complete the works and to rectify substantial defects in the constructions of the project. The appellant also claimed that the CPC was defective and improperly issued. The defendant brought this appeal against the decision of the learned High Court Judge who had entered summary judgment in the sum of RM8,000,000 for the plaintiffs under O. 14 of the Rules of the High Court 1980.

Held (dismissing this appeal with costs)
Per Low Hop Bing JCA delivering the majority judgment of the court:

(1) The terms of the DOA were clear and unambiguous. The DOA referred to the SPA and the Turnkey Contract and clearly stated that the defendant was to pay the plaintiffs for and on behalf of Gaya the balance sum due from Gaya to the plaintiffs under the Turnkey Contract. The defendant had an obligation to pay the remaining sum of RM8,000,000 to the plaintiffs. (para 14)

(2) There was no merit in the defendant's contention that the sum of RM8,000,000 was a retention sum. There was no triable issue as the plaintiff's claim was plain and obvious. (paras 16 & 17)

Per Hishamudin Mohd Yunus JCA (dissenting):

(1) The dispute between the parties was not a dispute that could be resolved summarily by way of an O. 14 application. The appellant had succeeded in raising the following triable issues: (a) Were there incomplete works and substantial defects in the construction of the project by the respondents?; (b) If so,

then, were the respondents under an obligation to complete the works and rectify the defects before they were entitled to claim the assigned sum of RM8 million from the appellant?; and (c) Was the CPC properly and validly issued by the project architect? (paras 51 & 52)

(2) The defence and counterclaim of the appellant was not a mere sham. This was not a straightforward case for the respondents such that summary judgment ought to be granted. It is trite law that, in resisting an O. 14 application, the defence did not have to show that they were likely to succeed at the trial. All that they had to do was to satisfy the court that there were *bona fide* triable issues and that they deserved their day in court. They had succeeded in doing so. (para 89)

Bahasa Malaysia *Translation Of Headnotes*

Gaya Kombinasi (M) Sdn Bhd ('Gaya'), iaitu majikan, telah memberi responden-responden ('plaintif-plaintif') Kontrak Turnkey untuk pembinaan suatu bangunan pejabat yang dikenali sebagai Mines Waterfront Business Park dengan balasan sebanyak RM70,500,000. Kemudiannya, Gaya telah menandatangani suatu perjanjian jual beli ('PJB') dengan perayu ('defendan') di mana Gaya bersetuju menjual kepada defendan tanah bersama-sama dengan pejabat bangunan yang sedang dibina pada masa itu. Plaintif-plaintif bukan pihak kepada PJB, sementara defendan bukan pihak kepada Kontrak Turnkey. Untuk memudahkan pembayaran jumlah baki RM19,396,709 yang dihutang oleh Gaya kepada plaintif-plaintif di bawah Kontrak Turnkey, surat ikatan penyerahhakkan ('SIP') telah ditandatangani oleh Gaya, plaintif-plaintif dan defendan. SIP menyediakan seperti berikut: (i) selain dari membayar Gaya RM15,000,000 sebagai pembayaran sebahagian di bawah PJB, defendan akan membayar jumlah ini terus kepada plaintif-plaintif; (ii) bahawa jumlah yang tinggal sebanyak RM4,386,709 yang dihutang kepada plaintif-plaintif oleh Gaya di bawah Kontrak Turnkey akan dibayar terus oleh Gaya kepada plaintif-plaintif; dan (iii) sebagai balasan RM15,000,000 yang dibayar oleh defendan untuk dan bagi pihak Gaya kepada plaintif-plaintif, Gaya tidak akan mempunyai apa-apa tuntutan terhadap defendan berhubungan dengan RM15,000,000 tersebut dan jumlah ini akan dianggap sebagai dilepaskan sepenuhnya di bawah PJB. Bila plaintif-plaintif mencapai Penamatan Praktikal,

Arkitek telah mengeluarkan CPC pada tarikh tersebut. Responden-responden menghujah bahawa mereka berhak dibayar secara tidak bersyarat dalam masa 18 bulan dari tarikh pengeluaran CPC. Perayu, walau bagaimanapun, enggan membayar responden-responden jumlah 8 juta seperti yang dituntut oleh mereka atas alasan-alasan kegagalan responden-responden menamatkan kerja dan membetulkan kecacatan substantial dalam pembinaan projek. Perayu juga mendakwa bahawa CPC cacat dan dikeluarkan secara salah. Defendan mengemukakan rayuan ini terhadap keputusan yang arif Hakim Mahkamah Tinggi yang telah mencatatkan penghakiman terus dalam jumlah RM8,000,000 untuk plaintif-plaintif di bawah A. 14 Kaedah-Kaedah Mahkamah Tinggi 1980.

Diputuskan (menolak rayuan ini dengan kos)
Oleh Low Hop Bing HMR menyampaikan penghakiman majoriti mahkamah:

(1) Terma-terma SIP adalah jelas dan nyata. SIP merujuk kepada PJB dan Kontrak Turnkey dan menyatakan dengan jelas bahawa defendan seharusnya membayar plaintif-plaintif untuk dan bagi pihak Gaya jumlah baki yang dihutang oleh Gaya kepada plaintif-plaintif di bawah Kontrak Turnkey. Defendan mempunyai kewajipan membayar jumlah yang tinggal sebanyak RM8,000,000 kepada plaintif-plaintif.

(2) Tidak ada merit dalam hujahan defendan bahawa jumlah RM8,000,000 adalah wang tahanan. Tiada apa-apa isu yang perlu dibicara kerana tuntutan plaintif adalah jelas dan ketara.

Oleh Hishamudin Mohd Yunus HMR (menentang):

(1) Pertikaian di antara pihak-pihak bukan suatu pertikaian yang boleh diselesaikan secara terus melalui permohonan A. 14. Perayu telah berjaya menimbulkan isu-isu yang perlu dibicara yang berikut: (a) Adakah masih ada kerja-kerja yang belum siap dan kecacatan substantial dalam pembinaan projek oleh responden-responden?; (b) Jika ada, kemudian, adakah responden-responden di bawah kewajipan untuk menyiapkan kerja-kerja dan membetulkan kecacatan sebelum mereka berhak menerima jumlah 8 juta yang diserahhakkan oleh perayu?; dan (c) Adakah CPC dikeluarkan dengan betul dan sah oleh arkitek projek?

A **(2)** Pembelaan dan tuntutan balas perayu bukan semata-mata suatu penipuan. Ini bukan merupakan kes yang jelas dan mudah bagi responden-responden yang mewajarkan penghakiman terus sepatutnya diberikan. Ia adalah undang-undang mantap bahawa, dalam menentang permohonan A. 14, B pembelaan tidak perlu membuktikan bahawa mereka akan berjaya pada perbicaraan. Mereka hanya perlu memuaskan mahkamah bahawa terdapat isu-isu bona fide yang perlu dibicara dan bahawa mereka berhak didengar di mahkamah. Mereka telah berjaya berbuat demikian.

C **Case(s) referred to:**
Koh Siak Poo v. Perkayuan OKS Sdn Bhd [1989] 3 MLJ 164 SC ***(refd)***
Fadzil Mohamed Noor v. Universiti Teknologi Malaysia [1981] CLJ 85; [1981] CLJ (Rep) 53 FC ***(refd)***

D **Legislation referred to:**
Rules of the High Court 1980, O. 14

For the appellant - Datuk DP Naban (Nitin Nadkarni & Darshendev Singh with him); M/s Lee Hishamuddin Allen & Gledhill
For the respondents - Ivan Loo (Audrey Choo & Aziatulazwa with him); E *M/s Wong, Ina & Assocs*

[Appeal from High Court, Kuala Lumpur; Suit No: D2-22-536-2001]

Reported by Amutha Suppayah

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JUDGMENT

Low Hop Bing JCA:

G **Appeal**

[1] The appellant (defendant) has brought this appeal against the decision of the learned High Court Judge who had entered summary judgment in the sum of RM8,000,000 with interest and H costs for the respondents (plaintiffs) under O. 14 of the Rules of the High Court 1980.

[2] By majority, we dismissed the defendant's appeal and affirmed the summary judgment. We give our grounds below.

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Factual Background

[3] By letter of award dated 15 June 1996, Gaya Kombinasi (M) Sdn Bhd (Gaya), the employer, awarded to the plaintiffs a Turnkey Contract for the construction of an office building known as Mines Waterfront Business Park at a consideration of RM70,500,000. Completion date was 30 March 1998.

[4] On or about 4 December 1996, Gaya entered into a sale and purchase agreement (SPA) with the defendant. Pursuant to the SPA, Gaya agreed to sell and the defendant agreed to buy the land together with the office building under construction then.

[5] The plaintiffs were not parties to the SPA, while the defendant was not a party to the Turnkey Contract.

[6] To facilitate payments of the balance sum of RM19,386,709 due by Gaya to the plaintiffs under the Turnkey Contract, a deed of assignment dated 12 February 1999 (the DOA) was entered into between Gaya, the plaintiffs and the defendant.

[7] The Recital to the DOA sets out the background between the three parties. The pertinent paragraphs of the Recital are:

> (1) WHEREAS (the defendant) is obliged, under the (SPA) to make payments to (Gaya) upon the occurrences of certain events as specified in the Second Schedule thereof;
>
> (2) WHEREAS (Gaya) has an outstanding account due to the (plaintiffs) for works done and is hereby desirous of assigning part of the payments due from (the defendant) to (Gaya) under the (SPA), to the (plaintiffs); and
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> (3) WHEREAS (the defendant) is agreeable to pay the (plaintiffs), for and behalf of (Gaya), and in accordance with the terms and conditions hereinafter appearing.

[8] Clauses 1 and 2 of the DOA expressly provide as follows:

> 1. (Gaya) and the (plaintiffs) hereby confirm and acknowledge that the balance sum due under the Turnkey Contract from (Gaya) and the plaintiffs amounts to RM19,386,709.00 (hereinafter called the "Balance Turnkey Sum"); and
>
> 2. (Gaya) hereby consents and agrees to the assignment of a portion of the sums in Second Schedule of the SNP(SPA) amounting to RM15,000,000 to be assigned to the

A (plaintiffs) by the (the defendant) (hereinafter called "the Assignment Sum") as part payment of the Balance Turnkey Sum with the excess whereof to be supplemented by (Gaya) (hereinafter called the "Excess Sum") in order to fulfil (Gaya's) obligations to pay the (defendant) in accordance with the Turnkey Contract.

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(A reference hereinafter to a clause is a reference to that clause in the DOA).

[9] Clause 2 further provides for the schedule of payment from C the defendant and Gaya to the plaintiffs, *viz* RM7,000,000 from the defendant upon execution of the DOA and a further sum of RM8,000,000 to be paid 18 months from the date of the CPC or earlier if so agreed.

D **[10]** It is abundantly clear that cls. 1 and 2 reveal the following facts:

(1) Gaya owes the plaintiffs RM19,386,709 under the Turnkey Contract;

E (2) The defendant has to pay Gaya certain sums of money under the SPA;

(3) Instead of paying Gaya RM15,000,000 as part payment under the SPA, the defendant would pay this sum directly to the F plaintiffs; and

(4) The remaining sum of RM4,386,709 due to the plaintiffs from Gaya under the Turnkey Contract shall be paid by Gaya directly to the plaintiffs.

G **[11]** Clause 3 that states that in consideration of the RM15,000,000 being paid by the defendant for and on behalf Gaya to the plaintiffs, Gaya will have no claim against the defendant in respect of the RM15,000,000 and that this sum shall be considered as having been fully discharged under the SPA.

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[12] Under cl. 4, the plaintiffs agree that the RM15,000,000 paid in full by the defendant shall constitute a full discharge of Gaya's obligations to the plaintiffs up to RM15,000,000 as is due under the Turnkey Contract.

I **[13]** When the plaintiffs achieved Practical Completion on 21 April 1999, the Architect duly issued the CPC on that date.

Summary Judgment

[14] In affirming the decision of the learned High Court Judge, the majority (Low Hop Bing and Syed Ahmad Helmy bin Syed Ahmad JJCA) are the view that the terms of the DOA are clear and unambiguous. The DOA refers to the SPA and the Turnkey Contract and clearly states that the defendant is to pay the plaintiffs for and on behalf of Gaya the balance sum due from Gaya to the plaintiffs under the Turnkey Contract.

[15] The defendant now has an obligation to pay the remaining sum of RM8,000,000 to the plaintiffs. This is the sum that it should have paid to Gaya under the SPA for the office building, which is also the sum that Gaya should have paid to the plaintiffs under the Turnkey Contract. By being a party to the DOA, the defendant agreed to pay that sum of money to the plaintiffs on behalf of Gaya.

[16] We find no merit in the defendant's contention that the sum of RM8,000,000 was a retention sum. Clause 2 in fact describes the amount assigned as the "assignment sum".

[17] In essence, this appeal turns on the construction of the clear and unambiguous terms of the DOA. We are unable to find any triable issue as the plaintiff's claim is plain and obvious. The plaintiffs are entitled to summary judgment: See eg, *Koh Siak Poo v. Perkayuan OKS Sdn Bhd* [1989] 3 MLJ 164 SC; and *Fadzil Mohamed Noor v. Universiti Teknologi Malaysia* [1981] CLJ 85; [1981] CLJ (Rep) 53 FC.

Conclusion

[18] The majority therefore dismissed this appeal with costs of RM3,000 and affirmed the summary judgment entered for the plaintiff. Deposit to the plaintiff on account of the fixed costs.

Hishamudin Mohd Yunus JCA (dissenting):

[19] This is an appeal by the appellant/defendant against the decision of the High Court of Kuala Lumpur that had allowed the respondents'/plaintiffs' appeal to the judge in chambers against the decision of the senior assistant registrar.

[20] Earlier, the senior assistant registrar had dismissed the respondents' application for an O. 14 summary judgment against the appellant.

[21] In my judgment, this appeal should be allowed with costs, and the decision of the learned senior assistant registrar (dismissing the O. 14 application) be restored.

[22] My reasons are as follows.

[23] In my judgment, the dispute between the parties is not a dispute that could be resolved summarily by way of an O. 14 application. To my mind, the issues raised by the defence are *bona fide* triable issues.

[24] The respondents' claim against the appellant is for a sum of RM8 million under a deed of assignment ('DOA') dated 12 February 1999 entered into between three parties, namely:

(1) a property development company known as Gaya Kombinasi Sdn Bhd (who hereinafter shall be referred to as 'Gaya Kombinasi');

(2) the appellant (Uniphone Telecommunications Bhd); and

(3) the respondents (Bridgecon Engineering Sdn Bhd and Fujita Corporation (M) Sdn Bhd).

[25] It is common ground that under the DOA the appellant agreed to pay the respondents an assigned sum of RM15 million. This RM15 million is among the sums payable by the appellant to Gaya Kombinasi under a sale and purchase agreement (SPA) entered into between the appellant (as the purchaser) and Gaya Kombinasi (as the vendor).

[26] It is necessary here to allude to some background facts in order to appreciate the issues. Prior to the DOA, by a letter of award dated 15 June 1996, the respondents were awarded a turnkey contract by Gaya Kombinasi to build a project for RM70.5 million ('turnkey contract'). This project is known as the Mines Waterfront Business Park ('the project'). The appellant is not a party to this turnkey contract.

[27] Some six months later, on 4 December 1996, while the construction of the project was still ongoing, Gaya Kombinasi sold the project to the appellant for a sum of RM161,088,000 – hence the SPA. The respondents are not parties to this SPA.

[28] Slightly more than two years later, on 12 February 1999, the appellant, the respondents and Gaya Kombinasi entered into the DOA mentioned earlier. Under this DOA, Gaya Kombinasi acknowledges that it still owes the respondents a sum of RM19,386,709 under the turnkey contract. Therefore, as said earlier, by this DOA, Gaya Kombinasi assigned RM15 million, payable to Gaya Kombinasi (as the vendor) by the appellant (as the purchaser), to the respondents, as part payment of the sum owing by Gaya Kombinasi to the respondents under the turnkey contract. This sum of RM15 million is to be paid to the respondents by the appellant in the following manner:

(a) RM7 million to be paid by the appellant upon the execution of the DOA (it is not disputed that this sum was paid by the appellant to the respondents); and

(b) the balance of RM8 million to be paid by the appellant within 18 months after the issuance of the Certificate of Practical Completion ('CPC').

[29] Low Hop Bing JCA, in the majority judgment, has set out the provisions of the fourth, fifth and sixth recitals to the DOA. Here, in this judgment, I shall set out the provisions of the first, second and third recitals, and they are as follows:

> WHEREAS by a Sale and Purchase Agreement dated December 4, 1997 [1996] made between the Assignor and UTB (hereinafter called the SNP) the Assignor *inter alia* agreed to sell to UTB, and UTB agreed to purchase the parcel of land held under H. S. (D) No: 59889, PT NO. 16717 in the Mukim of Petaling, Daerah Petaling (the Property) together with a customized building erected thereon, as specified and described in the Third Schedule of the SNP together with the variations, supplements and further enhancements (the Building) as agreed between UTB and the Assignor in the course of the fulfilment of their respective obligations under and in relation to the SNP.
>
> WHEREAS by a FIDIC Conditions for Contract for Design, Build and Turnkey dated 15th of June 1996 by and between the Assignor and the Assignee, the Assignee had agreed to design and build the said Building for and on behalf of the Assignor (hereinafter called the Turnkey Contract) upon the terms and conditions generally outlined therein and specifically detailed in a letter dated 15th June 1996 at a Contract Price of RM70,500,000 (hereinafter called the 'Turnkey Sum').

A WHEREAS the Building has to date been amply completed save for the finalisation of works to be executed by contractors nominated by UTB (hereinafter called NSCs) under the supervision of the Assignee as consented to by the Assignor.

B **[30]** In this judgment, I also propose to set out other relevant provisions of the DOA. They are as follows:

1. The Assignor and the Assignee hereby confirm and acknowledge that the balance sum due under the Turnkey Contract from the Assignor and the assignee amounts to RM19,386,709.00 only (hereinafter called the "Balance Turnkey Sum".

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2. The Assignor hereby consents and agrees to the assignment of a portion of the sums in Second Schedule of the SNP amounting to RM 15,000,000 to be assigned to the Assignee by UTB (hereinafter called "the Assignment Sum") as part payment of the Balance Turnkey Sum with the excess whereof to be supplemented by the Assignor (hereinafter called the "Excess Sum") in order to fulfil the Assignor's obligations to pay the Assignee in accordance with the Turnkey Contract. The Schedule for payment of the Assignment and Excess Sums respectively is as herein below stated:

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Event	UTB to pay (Assignment)	Assignor to pay (Excess)
1. Upon execution hereof	RM7,000,000	RM1,500,000
2. 18 months from the date of CPC or earlier subject to negotiations between parties concerned	RM8,000,000	RM2,886,709
TOTAL	RM15,000,000	RM4,386,709

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The Assignment Sum and the Excess Sum shall be paid simultaneously by UTB and the Assignor respectively, according to the above schedule.

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3. In consideration of the Assignment Sum being paid by UTB for and on behalf of the Assignor to the Assignee, the Assignor hereby irrevocably undertakes that it shall have no claim whatsoever against UTB in respect of the Assignment Sum and that the same shall be considered as having been fully discharged under the SNP.

4. Accordingly, the Assignee hereby also irrevocably agrees that the Assignment Sum paid in full by UTB shall constitute a full discharge of the Assignor's obligations to the Assignee up to the amount of the Assignment Sum as due under the Turnkey Contract.

5. The Assignment Sum and the Excess sum shall be payable to the Assignee unconditionally PROVIDED that the Assignee hereby undertakes to perform its obligations towards the fulfilment and achievement of the new CPC Date. Failure of either UTB or the Assignor to honour or fulfil its obligations hereunder shall not affect the other's obligations hereunder. The Parties agree that payment of the Assignment Sum and the Excess Sum shall be treated as separate, severable transactions and non-performance of one shall not jeopardize the other's obligations and liabilities hereunder, nor shall it allow the Assignee to refuse to perform his obligations hereunder and in relation to meeting the new CPC Date.

6. Save for the variation in relation to payments, as agreed to by way of this Deed, all other terms and conditions and rights of parties under the SNP and the Turnkey Contract shall remain unchanged.

7. Where any of the provisions in the SNP or the Turnkey Contract shall detract from or be inconsistent with the intention of the parties as provided in this Deed, then it is hereby expressly agreed that the provisions of this Deed shall supercede and prevail.

8. In addition to the assignment of the payments and the payments of the Excess sum aforementioned the Parties hereby also agree that the following matters are hereby to constitute the amendments and variations of the rights, obligations, and liabilities of the Parties in relation to the SNP and the Turnkey Contract respectively:

   8.1 The new Certificate of Practical Completion (CPC) Date shall be April 21, 1999. CPC shall be certified by the architect in the manner prescribed by Pertubuhan Akitek Malaysia (PAM).

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8.2 The parties shall NOT, subject to sub-clause 8.5 below claim any extension of time, or Liquidated Damages or crave any other indulgences up to the new CPC Date. Further, the same relief shall flow through to all sub-contractors and Suppliers whether appointed by UTB, the Assignor or the Assignee, as the case may be.

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8.3 That reasonable access to site and the use of such conveniences be granted by the Assignee to all sub-contractors and Suppliers without exception, to ensure that there shall be no cause for delay due to non-availability of site access.

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8.4 That the Assignee shall not threaten or cause the stoppage of works or in any way impede or frustrate or cause the impediment or frustration of progress of works at site as allowed under the Turnkey Contract in order that it fulfil all its obligations in relation to meeting the new CPC Date.

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8.5 UTB shall not make any more changes or modifications nor cause any more variations to the design or composition of the Building, save for those Variation Orders (VOs) and NSCs already submitted and agreed as at the date hereof. Any amendment or variation to the plans created subsequent to the date hereof may, subject to agreement of all the parties, cause the possible extension of the new CPC Date.

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8.6 The Assignor shall with the assistance and cooperation of the Assignee, cause the timely applications and submissions for procurement of the Certificate of Fitness for the Building PROVIDED that the Assignor shall not be liable to UTB or the Assignee in respect of any delay in the issuance of the Certificate of Fitness by the relevant authority.

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8.7 The Assignee shall upon execution hereof allow UTB full control over the logistics at site and shall on a regular basis obtain the consent from UTB for the admission of persons whether NSCs, the Assignee's sub-contractors or representatives of the Assignor on the site, which consent shall not be unreasonably withheld. Notwithstanding the foregoing, the Assignee shall remain responsible for purposes of liaison with the authorities' compliance with laws and regulations relating but not limited to insurance, safety and occupiers' liability.

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8.8 The Assignor shall hand over vacant possession of the Property (land and building) to UTB upon CPC to enable UTB to continue with the fit-outs for the building.

8.9 Both the Assignor and Assignee shall fulfil their respective obligations to rectify any damage or defects appearing within the period of 18 months from the new CPC Date.

8.10 Any party who defaults or breaches the provisions of this Deed shall indemnify and keep the non-defaulting parties fully indemnified from any claims, demands, proceedings, losses, damages, liabilities, costs and other compensation, expenses and charges whatsoever to which the Non-Defaulting Party(ies) shall or may become liable in respect of or arising out of the aforesaid breach unless the breach is directly attributable to the Non-Defaulting Party's act, omission or negligence.

8.11 The parties hereby acknowledge the impracticality and impossibility to provide for every contingency that may arise in the course of performing their respective obligations under this deed; THEREFORE, the parties hereby declare that this Deed shall operate by and among them in accordance with the principles of good faith, with fairness, and without any inconsistent intent to cause detriment to the interest of any one party hereof. Accordingly, any dispute or inconsistency which may arise shall be dealt with and resolve upon such principles of goodwill and fairness, equitably by and among the parties.

...

14. For ease of comprehension, wherever applicable herein, the:

14.1 words importing the singular shall include the plural and *vice versa*;

14.2 words denoting the male gender shall include the female and neuter gender and *vice versa*;

14.3 words which have been defined in the SNP and the Turnkey Contract shall have those meanings as ascribed thereto in the respective agreements, unless herein expressly provided otherwise.

[31] It is important to note that the DOA makes reference to the turnkey contract as well as to the SPA (the SPA is referred to in the DOA as 'SNP').

[32] In the present case, the CPC was issued by the project architect, KPK Architect, on 21 April 1999.

[33] It is the contention of the respondents that they are entitled to be paid unconditionally within 18 months from the date of the issuance of the CPC in respect of the project that it had built for the developer, Gaya Kombinasi.

[34] The appellant, however, after the expiry of the 18-month period, refused to pay the respondents the sum of RM8 million as claimed by the latter. They have their reasons for the refusal, but I will deal with them shortly.

[35] Therefore, the sum in issue in the court below and in this appeal is this RM8 million.

[36] The respondents filed their writ summons and statement of claim on 3 April 2001.

[37] The appellant filed their statement of defence and counterclaim on 5 June 2001.

[38] The respondents filed their reply and defence to the counterclaim on 9 July 2001.

[39] The respondents filed their application for summary judgment on 25 May 2001.

[40] On 25 October 2002 the learned senior assistant registrar dismissed the respondents'/plaintiffs' summary judgment application.

[41] The respondents appealed to the judge in chambers.

[42] On 18 January 2010 the learned High Court Judge allowed the respondents'/plaintiffs' appeal to judge in chambers.

[43] In their defence, the appellant contends that the respondents are not entitled to the RM8 million as specified under the DOA. This is because of their failure to carry out an obligation under the DOA, namely, to complete the works and to rectify substantial defects in the constructions of the project.

[44] That there are defects does not appear to be disputed by the respondents. But what are in dispute are the extent of the defects and the legal implication of the defects. It is also the contention of the appellant that the DOA preserves the respondents' obligations to make good defects arising during the defect liability period. It is further contended by the appellant that the RM8 million is in fact the retention sum payable under item 7 of the 2nd Schedule to the Sale and Purchase Agreement.

[45] It is further contended by the appellant that the CPC was defective and improperly issued. In other words, the CPC is invalid.

[46] In response, the respondents argue that the right to the RM8 million under the DOA is absolute and is free of any obligation whatsoever towards the appellant under the SPA – other than the obligation to obtain the CPC. The respondents take the position that if at all they have a legal responsibility to make good the defects, it is only towards Gaya Kombinasi under the turnkey contract.

[47] As I see it, what essentially is in issue between the parties is the interpretation of the DOA. Is it to be interpreted in the way as contended by the appellant? Or, is it to be interpreted in the manner as urged by the respondents?

[48] At the High Court, the learned judge in granting the respondents'/plaintiffs' summary judgment application was of the view that parties must only confine themselves to the DOA, and that the SPA is irrelevant for the purpose of determining the appellant's obligation to pay the RM8 million under the DOA. The learned judge, in her judgment, takes the view that the issue pertaining to the defects, as raised by the appellant, is an issue for the appellant to raise with Gaya Kombinasi; and not with the respondents. In her opinion, the respondents have no obligation whatsoever to the appellant regarding making good the defects. It is her judgment that the respondents' obligation to make good the defects is only towards Gaya Kombinasi under the turnkey contract. In other words, the respondents are liable only towards Gaya Kombinasi for the defects; and not towards the appellant. It is towards Gaya Kombinasi, the vendor, that the appellant, as the purchaser, must seek his remedy for the defects and the incomplete works.

[49] The learned judge also was of the view that the CPC issued was proper and valid; and that, once a valid CPC was issued, the appellant's obligation to pay within 18 months under the DOA is triggered – regardless of the existence of defects.

[50] In the words of the learned judge:

> 16. Under clause 5 of the Deed of Assignment, the assigned sum as payable "unconditionally" to the plaintiffs provided that the plaintiffs undertakes to perform their obligations to fulfil and achieve the new CPC date. This they have complied with as the CPC was issued on 21-4-1999, the new CPC date under the Deed of Assignment.
>
> 17. The Deed of Assignment makes it clear in clause 6 that except for the variation as to the payment, all other terms and conditions and rights of parties under the SPA and the Turnkey Contract remain unchanged. In other words, where the SPA is concerned, the parties (namely Gaya and the defendant) continue to be bound by the terms of the SPA. Where the Turnkey Contract is concerned, Gaya and the plaintiffs continue to be bound thereby. The plaintiffs and the defendant are only bound by the terms of the Deed of Assignment.
>
> 18. Under the Deed of Assignment, Gaya and the plaintiffs agreed that they "shall fulfil their respective obligation to rectify any damage or defects appearing within the period of 18 months from the new CPC date".
>
> 19. Gaya's obligations to make good the defects certainly must be their obligation to the defendant under clause 17 of the SPA [Enclosure 13, Exhibit "EK-5"]. Under clause 17.6 of the SPA, Gaya and the defendant agreed that if the cost of making good the defects is more than the Defect Retention Sum (which under clause 17.3 of the SPA is held by the defendant), the excess amount "shall be a debt due by the Vendor to the Purchaser". In other words, it would be a debt due from Gaya to the defendant. The plaintiffs are not parties to the SPA.
>
> 20. It is therefore clear that the defects which become apparent during the defect liability period, as far as the defendant is concerned, are issues to be taken up with Gaya, under the terms of the SPA, not with the plaintiffs. Gaya would then take them up, under the Turnkey Contract, with the plaintiffs.

21. As for the CPC, it is a certificate of practical completion. Hence the defect liability period and the provisions in clause 17 of the SPA dealing with them. The mere fact that there are still defects to be corrected does not mean that the CPC had been improperly issued.

22. As far as the plaintiffs are concerned, Gaya had assigned to them RM15 million out of the purchase price payable by the defendant to Gaya and RM8 million was due 18 months after the date of the CPC. As the CPC was issued on 21-4-1999, the period of 18 months ended on 21-10-2000. The sum of RM8 million was therefore due and payable by that date.

[51] Having considered the pleadings, the affidavits together with the documentary evidence adduced, and the submissions, I am satisfied that the appellant had succeeded in raising the following triable issues:

(1) Were there incomplete works and substantial defects in the construction of the project by the respondents?

(2) If the answer to question (1) above is in the affirmative, then, are the respondents under an obligation to complete the works and rectify the defects before they are entitled to claim the assigned sum of RM8 million from the appellant?

(3) Again, if the answer to issue (1) above is in the affirmative, then, was the CPC properly and validly issued by the project architect?

[52] I shall now deal with these three issues one by one. I will begin with the first issue.

Were There Incomplete Works And Substantial Defects In The Construction Of The Project By The Respondents?

[53] The SPA defines 'defect' as follows:

'Defect' means any imperfection, sinking, shrinkage, omission or any other fault whatsoever which may be notified in writing by the purchaser to the vendor with regards to the project during the Defects Liability Period and which are due to materials or goods or workmanship not in accordance with the Base Building Description, the drawings and specifications or the requirements of any Relevant Authority or the Purchaser;

[54] 'Defect Liability Period' is defined in the SPA as:

> 'Defect Liability Period' means the period to run eighteen (18) months from the date of the issuance of the Certificate of Practical Completion.

[55] To my mind this first issue is a triable issue. Firstly, it is not disputed that there are defects in the construction of the project by the respondents. What is disputed, however, is the extent of the defects and whether or not there are incomplete works. The respondents maintain that the whole work was completed but conceded that there were defects. But according to the respondents the defects are not serious in nature. In other words, the defects are only minor or cosmetic in nature. The appellant, on the other hand, contends that the incomplete works and defects are serious and substantial.

[56] Secondly, the appellant has raised this issue of incomplete and substantial defective works in their statement of defence and counterclaim. The works yet to be completed and yet to be remedied are as set out in Appendixes I and II to the statement of defence and counterclaim. They have also raised this issue in their affidavits filed in opposing the respondents' summary judgment application (see paras. 34 and 35 and exh. EK11 of the defendant's first affidavit). According to the appellant's affidavits, they have obtained a quotation for the completion of these works; and they are estimated to be in the sum of RM16,349,005.77 (see exh. EK12 of the defendant's first affidavit). The appellant has even filed a counterclaim for RM17 million. In their counterclaim the appellant claims that they have incurred RM856,481.70 to rectify some of the defects, and documents detailing such defects have been produced as exh. EK10 of the defendant's first affidavit. In their counterclaim the appellant is also claiming a further sum of RM16,349,005.77 alleging that this is the sum that they would be incurring in order to complete the incomplete works and to remedy defective works. In their affidavits the appellant has produced particulars of the incomplete works and defects and the contractors that would be engaged to complete the works and or to remedial the defects, and they have also produced the quotations.

[57] Thirdly, if, indeed, the defects are only minor in nature and not substantial, as claimed by the respondents, why was the Certificate of Making Good Defects of Works issued to the respondents by the project architect, KPK Architect, only issued on 6 November 2001, that is to say, only issued more than two and a half years later, after the date of the issuance of the purported CPC (on 21 April 1999)? The length of time taken by the respondents to make good the defects lends credence to the appellant's claim that the defects were extensive and substantial in nature and not mere minor ones. Or, to put it in another way, the length of time taken by the respondents to complete the so-called 'minor defects' contradicts the respondents' claim that the defects were only minor or cosmetic in nature.

[58] I now move on to the second issue.

If The Answer To Question (1) Above Is In The Affirmative, Then, Are The Respondents Under An Obligation To Complete The Incomplete Works And To Rectify The Defects First Before They Are Entitled To Claim The Assigned Sum Of RM8 Million From The Appellant?

[59] It is the contention of the appellant that if there are incomplete works and substantial defects (and it is the position of the appellant that there are incomplete works and substantial defects) then the respondents are under an obligation to complete the incomplete works and to rectify the substantial defects first before they are entitled to claim the RM8 million. In my judgment, this position taken by the appellant cannot be summarily dismissed as an argument that is devoid of substance. Firstly, there is nothing in the DOA that clearly or unequivocally states that the respondents have no obligation at all towards the appellant should there be any incomplete works or substantial defects in the works.

[60] Second, the DOA makes reference to the turnkey contract and the SPA. This being the case, therefore, in interpreting the DOA, the DOA must be read together with the turnkey contract and the SPA. In fact the SPA is referred to in the first recital of the DOA; and the DOA expressly preserved all the terms and conditions of the SPA and the turnkey contract (see cl. 6 of the DOA). Needless to say, the respondents are aware of the terms of the SPA.

[61] Third, the appellant in their affidavits takes the position that it was the intention of all parties to subject the respondents' rights under the DOA to the obligations under the SPA. Under the terms of the SPA, Gaya Kombinasi, as the developer/vendor had an obligation to remedy the defects first before it could receive payments. The court therefore must look at the matrix of facts in which the DOA was entered into. In this regard, it is pertinent to point out that one of the obligations under the SPA is cl. 10 that states:

> 17. DEFECTS IN BUILDING
>
> 17.1 Any defects shrinkage or other faults in the building which shall become apparent within the period of eighteen (18) months after the date of issuance of the Certificate of Practical Completion and which are due to defective workmanship or materials not in accordance with this agreement shall be made good by the Vendor at its own costs PROVIDED ALWAYS that such defects shrinkage and other faults in the building shall not be caused and/or occasioned by any Variation Orders pursuant to Clause 14 of the Agreement within:
>
> (i) twenty-four (24) hours from receipt of notification if the defect is dangerous or life threatening; or
>
> (ii) within fourteen (14) days from the date of receipt of notification of the same remedy or caused to be remedied in a good and workmanlike manner all defects occurring in and to the building which shall appear within the Defect Liability Period. If the vendor shall not have commenced works to make good the defects within fourteen (14) days from the date of notification by the purchaser, the purchaser shall be entitled to deduct and utilize from the Defect Retention Sum all monies costs and expenses incurred by the purchaser in making good the same.

[62] Fourth, if, indeed, under the DOA the respondents are under no obligation at all towards the appellant to complete incomplete works and to rectify defects (as so contended by the respondents), then, why does the DOA stipulate that the payment of the RM8 million to be made within 18 months of the issuance of the CPC? Why doesn't the DOA just stipulate that payment is to be made forthwith (or, within 14 days) upon the issuance of the CPC? Why allow a long grace period of 18 months?

[63] And, another consideration is that, if there has to be a grace period, why must it be 18 months? Why not three months; or, six months; or, 12 months? Now, in this regard, it is to be noted that the defect liability period under the SPA is 18 months (see cl. 17.1 of the SPA). Is it purely a coincidence that the grace period for payment of the RM8 million under the DOA and the defect liability period under the SPA is the same, that is, 18 months? Or, could it be contended that the DOA provides a grace period of 18 months for the payment with a purpose: and that is that this 18-month period is meant to be the defect liability period of 18 months as stipulated by cl. 17.1 of the SPA? And this then leads us to yet another question: could it not be validly contended that the RM8 million payable by the appellant under the DOA corresponds to the sum of RM8,054,400 under item 7 of the Second Schedule to the SPA? Let us see what the Second Schedule to the SPA says. The Second Schedule to the SPA reads:

THE SECOND SCHEDULE
(which is to be taken read and construed as an essential part of this Agreement)

1. Upon execution of this Agreement	RM15,000,000.00
2. Within 30 days from the date of this Agreement	RM20,000,000.00
3. Within 60 days from the date of this Agreement	RM5,000,000.00
4. Within 180 days from the date of this Agreement or the completion of the ground floor slab, whichever is the earlier	RM40,000,000.00
5. Within fourteen (14) days from the date of issuance of the Certificate of Practical Completion	RM35,516,800.00
6. Within fourteen (14) days from the date of issuance of the Temporary Certificate of Fitness for Occupation or the Certificate of Fitness for Occupation	RM36,516,800.00

7. Within fourteen (14) days from the end of the eighteen-month period after the issuance of the Certificate of Practical Completion		RM8,054,400.00
	Total:	RM161,088,000.00

[64] The appellant takes the position that the RM8 million as referred to in the DOA actually refers to the RM8,054,400 retention sum (please refer to the appellant's letter ref. leg/191000/BFJV of 19 October 2000 to Bridgecon at exh. EK9 of the defendant's first affidavit). If the RM8 million is meant to be the retention sum under the SPA, then it is arguable that the respondents are under an obligation towards the appellant to complete the incomplete works and to make good the defects first before the RM8 million could be released by the appellant to them, and should the respondents fail to do so, then the appellant is entitled to utilise the retention sum for the purpose of completing the works and making good the defects (see cl. 17.1 of the SPA).

[65] Fifth, the third recital of the DOA states:

> WHEREAS the Building has to date been amply completed save for the finalisation of works to be executed by contractors nominated by UTB (hereinafter called NSCs) **under the supervision of the Assignee** as consented to by the Assignor. (emphasis added)

[66] In the light of the above provision, does it lie in the mouth of the respondents to say that under the DOA they are not responsible at all to the appellant for any defect, when the DOA recognizes that the finalization of works to be executed by contractors comes under the supervision of none other but the respondents themselves?

[67] Sixth, there is the provision of cl. 8.9 of the DOA that stipulates:

> Both the Assignor and Assignee shall fulfil their **respective obligations** to rectify any damage or defects appearing within the period of 18 months from the new CPC Date. (emphasis added)

[68] What does the phrase 'respective obligations' means? It is the argument of the appellant that the phrase 'respective obligations' means that both Gaya Kombinasi and the respondents have an obligation towards the appellant to rectify any defect that appears within the 18-month defect liability period. The respondents, on the other hand, interpret the phrase 'respective obligations' to mean two things, namely:

(a) that the respondents have an obligation towards Gaya Kombinasi – but only towards Gaya Kombinasi, and only under the turnkey contract – to rectify any defect within the said 18-month period; and

(b) that Gaya Kombinasi, in turn, has an obligation towards the appellant, under the SPA, to rectify defect within the said 18-month period.

[69] To my mind, there is ambiguity in the phrase 'respective obligations'; and this ambiguity can only be resolved by having a trial, where the true intention of the parties could be ascertained.

[70] Seventh, there is also the provision of cl. 8.11 of the DOA that states:

> The parties hereby acknowledge the impracticality and impossibility to provide for every contingency that may arise in the course of performing their respective obligations under this deed; THEREFORE, the parties hereby declare that this Deed shall operate by and among them *in accordance with the principles of good faith, with fairness, and without any inconsistent intent to cause detriment to the interest of any one party hereof.* Accordingly, any dispute or inconsistency which may arise shall be dealt with and resolve upon such principles of goodwill and fairness, equitably by and among the parties.

[71] Are the respondents acting in accordance with the principles of good faith and fairness in their dealing with the appellant in demanding that the RM8 million be paid to them within 18 months after the issuance of the CPC without first completing the incomplete works and rectifying the substantial defects? Is it not detrimental to the interest of the appellant to pay the respondents the RM8 million when there are works yet to be completed by the respondents, and when there are substantial defects yet to be rectified by the same?

[72] Finally, it is arguable that in law the appellant (assuming that they able to prove the incomplete works and substantial defects) is entitled to set off the sums of RM856,481.70 and RM16,349,005.77 against the respondents' claim of RM8 million.

[73] Lastly, I come to the third issue.

Again, If The Answer To Issue (1) Above Is In The Affirmative, Then, Was The CPC Properly And Validly Issued?

[74] For convenience, I shall begin by reproducing the CPC here:

KpK architect

Certificate Of Practical Completion

Employer: Gaya Kombinasi (M) Sdn Bhd

Contractor: Bridgecon-Fujita Joint Venture

Project No/Title: 9544 – Cadangan Membina Sebuah Bangunan 10 Tingkat Yang Mengandungi 3 Tingkat Tempat Letak Kereta Dan 7 Tingkat Perniagaan Di Atas Lot 16717, Mukim Petaling, Daerah Petaling, Selangor Darul Ehsan.

Contract For: Cadangan Membina Sebuah Bangunan 10 Tingkat Yang Mengandungi 3 Tingkat Tempat Letak Kereta Dan 7 Tingkat Perniagaan Di Atas Lot 16717, Mukim Petaling, Daerah Petaling, Selangor Darul Ehsan.

Date Of Practical Completion Of The Entire Project: 21st April 1999

With the exception of the works as detailed in the Appendix attached.

A defect list of items to be completed or corrected is appended hereto. This list may not be exhaustive and the failure to include an item on it does not alter the responsibility of the Contractor to complete or correct all the work in accordance with the contract documents.

Defects Liability Period Ends On: 21st OCTOBER 2000

The work performed under this contract has been inspected by authorized representatives of the Employer, Contractor, Architect, and the Project manager of the Project, as indicated above is hereby declared to be practically completed on the above date.

Definition Of Practical Completion

The practical completion of a project or specified part of a project is deemed to have taken place when the construction is substantially and sufficiently completed in accordance with the contract documents, as modified by any variation orders agreed to by the parties, so that the Owner can occupy or utilize the project or specified area of the project for the use intended.

We declare that one moiety of the retention moneys deducted under previous certificates in respect of the said works or parts there of is to be released.

KPK Architect

... (sgd) ...
Koh Pee Kiat Date: 21st April 1999

No: Pendaftaran Akitek – A/K 61

The Contractor accepts the above Certificate of Practical Completion and agrees to complete and correct the items on the defect list within the time indicated.

Bridgecon-Fujita Joint Venture

...(sgd)...(sgd)...

Authorized Representative Date: 21 April 1999

The Employer accepts the project of the project as practically completed and will assume full possession of the project.

Gaya Kombinasi (M) Sdn Bhd

... (unsigned) ... Date: ...
Authorized Representative

[75] The term 'Certificate of Practical Completion' is not found in the turnkey contract. The DOA, however, makes reference to the CPC in several of its provisions; but it does not define the term. The term 'Certificate of Practical Completion' is also found in the SPA. It is only in the SPA that it is defined, and it is defined as:

'Certificate of Practical Completion' means the certificate issued by the Project Architect confirming that the building has been satisfactorily completed in accordance with the Third Schedule annexed herein;

[76] It is to be noted that the above CPC is unsigned by the developer/employer, Gaya Kombinasi; although the format of the CPC appears to require the approval/signature of Gaya Kombinasi. There is no explanation either by the respondents or by the project architect as to why there is this glaring omission.

[77] It is the appellant's contention that there cannot be a 'practical completion' if there are works yet to be completed and if there are also substantial defects. To the appellant, the purported CPC was issued 'ostensibly to meet the date set in the said Assignment', the date being 21 April 1999. In other words, the issuance of the purported CPC was not *bona fide*.

[78] In the alternative, the appellant submits that that in view of the long list of defects in the appendix to the CPC, the CPC at best is only a conditional CPC, and that a conditional CPC is not what the DOA contemplates: it has to be a clean CPC.

[79] In my opinion it is a triable issue as to whether or not the CPC was validly issued. Firstly, as I have pointed out just a moment ago, the format of the CPC appears to require the approval of Gaya Kombinasi, the employer. Yet there is no such approval; and there is no explanation offered either by the respondents or by the project architect for such absence of approval.

[80] Secondly, as shown above, the CPC issued has an appendix to it. This appendix to the CPC contains a long list of works yet to be completed by the respondents (see exh. EK6 of the defendant's first affidavit). Yet it is disquieting to note that the respondents, when exhibiting the CPC *via* their exh. BFJV4 of the plaintiffs' supporting affidavit, had omitted to exhibit the appendix, and hence the CPC exhibited was an incomplete CPC. Instead, it is the appellant who exhibited the appendix to the CPC, when they filed their affidavit in response to the respondents' supporting affidavit (see exh. EK6 of the defendant's first affidavit). When this failure on the part of the respondents to exhibit the appendix to the CPC was pointed out by the appellant in their affidavit, the respondents, in their reply affidavit, did not bother to provide any explanation whatsoever (for example, to explain that the omission to exhibit the appendix to the CPC was due to inadvertence – if, for example, it was indeed so). Instead, the respondents merely say:

> ... the fact that Exhibit BFJV4 to our First Affidavit did not append this list of defects cannot give the impression that the CPC was 'clean without any apparent defects'.

[81] Since, unfortunately, such is the nature of the response by the respondents, then, an inference can be drawn that the omission to exhibit the appendix to the CPC was deliberate or intentional.

[82] Thirdly, cl. 8.1 of the DOA stipulates:

> 8.1 The new Certificate of Practical Completion (CPC) Date shall be April 21, 1999. CPC shall be certified by the architect **in the manner prescribed by Pertubuhan Akitek Malaysia (PAM)**. (emphasis added)

[83] Is the above CPC issued in the manner as prescribed by PAM when:

(a) it is unsigned by the employer;

(b) that it contains an appendix with a long list of defects; and

(c) there is no declaration in the CPC that it is issued in accordance with the manner as prescribed by Pertubuhan Akitek Malaysia (PAM)?

[84] In the dispute between the appellant and the respondents, the CPC is a vital document; for the appellant's liability to pay depends upon the issuance of a valid CPC (besides ensuring that the work is completed and the defects are rectified). Now, the validity of the CPC is being seriously challenged by the appellant; for the reasons that I have set out above. In my view, in the present case, the legal burden is on the respondents to prove that the CPC is validly issued. And I do not think that it suffice for the respondents to merely assert in their affidavits that the CPC was issued by the project architect or that the CPC is properly or validly issued. In the light of cl. 8.1 above, to my mind, it is incumbent upon the respondents to show to the court that the CPC is issued in accordance with the requirement of that clause (cl. 8.1 of the DOA). In other words, it is incumbent upon the respondents to prove that that the CPC was issued 'in the manner prescribed by Pertubuhan Akitek Malaysia (PAM)'. How does the respondents go about to prove this? In my judgment, in

order to discharge the legal burden, it is incumbent upon the respondents to adduce documentary evidence of the rules of the Pertubuhan Akitek Malaysia (PAM) prescribing the manner of issuing a CPC. There is no such documentary evidence adduced. In fact, if one were to examine the CPC, nowhere it is stated that it is issued in accordance with the manner as prescribed by PAM. It is also to be observed that nowhere in the affidavits of the respondents that it is averred that the CPC was issued in the manner as prescribed by PAM. Paragraph 21 of the affidavit in support of the O. 14 application (that of Leow Kay Pin affirmed on 23 May 2001) states:

> 21. Clause 8.1 of the Assignment provided that the new CPC date should be 21.4.1999 and that the CPC would be issued and certified by the Architect.

[85] The above averment is merely a half-truth. What is not disclosed in the above averment is that cl. 8.1 of the DOA also stipulates that the CPC issued by the project architect must be 'in the manner prescribed by Pertubuhan Akitek Malaysia (PAM)'. I should also add here that there is no affidavit by the architect of the project that the CPC that he issued was in accordance with the manner as prescribed by PAM. Further, there is no presumption of law that where an architect issue a CPC, it must be presumed that the CPC was issued in accordance with the manner as prescribed by PAM; particularly where nowhere in the CPC it is stated that the CPC was issued in accordance with the manner as prescribed by PAM, and where the architect himself, the issuer of the CPC, has not affirmed any affidavit that the CPC that he issued was issued in accordance with the manner as prescribed by PAM.

[86] Fourthly, the appellant seriously disputes the list of defects as set out in the appendix to the CPC. According to the appellant, the defects are extensive and substantial and that some of the works are even incomplete. The appellant contends that the architect should not have issued the CPC. If a trial were to be held, and at the trial the appellant is able to prove that the defects are so extensive and substantial (besides some of the works being incomplete), then there is a case to argue that the issuance of the CPC by the project architect was wrong, not *bona fide* and unlawful.

[87] Fifthly, in the present case, the appellant's obligation to make the RM8 million payment to the respondents under the DOA arises only if there is in the first place a valid CPC issued by the project architect. If the CPC is invalid, the obligation to pay the RM8 million on the part of the appellant does not arise at all.

[88] Finally, even if we were to assume that the CPC was issued in good faith by the project architect, in view of the long list of defects in the appendix to the CPC, at best it is only a conditional CPC. It is arguable that the CPC mentioned to in the DOA is a clean CPC and not a conditional CPC. This brings us back to the issue as to what do the PAM rules say about the manner of issuing a CPC.

[89] In conclusion I hold that the defence and counterclaim of the appellant is not a mere sham. I am not convinced that this is a straight forward case for the respondents such that summary judgment ought to be granted. It is trite law that, in resisting an O. 14 application, the defence does not have to show that they are likely to succeed at the trial. All that the appellant has to do is to satisfy the court that there are *bona fide* triable issues and that they deserve their day in court. This, to my mind, undoubtedly, they have succeeded.

[Appeal allowed with costs]